# Khiudin bin Mohd & Anor v Bursa Malaysia Securities Bhd and another application

HIGH COURT (KUALA LUMPUR) — APPLICATION FOR JUDICIAL REVIEW NOS R2–25–467 OF 2010 AND R2–25–466 OF 2010
ROHANA YUSUF J
9 FEBRUARY 2012

*Administrative Law — Judicial review — Application for — Decision of Bursa to impose penalties on applicants — Whether Bursa had made erroneous decision in proceeding to deliberate on breaches of listing requirements against applicants despite ongoing criminal proceedings against them — Whether Bursa's decision caused real risk of serious prejudice to applicants — Whether applicants could rely on advice given by financial advisers — Whether enforcement action was made bona fide — Whether penalties imposed by Bursa arbitrary, unjust and not in line with precedents*

*Companies and Corporations — Directors — Duties — Obligation of directors to keep accounts — Whether directors discharged their obligations under listing requirements — Whether directors could rely on advice given by management and auditors — Whether pure reliance unreasonable — Companies Act 1965 s 167*

Bursa Malaysia Securities Bhd ('Bursa'), an exchange holding vested with statutory duties to maintain and promote the interests of members of the public dealing on the exchange, commenced proceedings against the CEO and two directors of Transmile Group Bhd ('the company'), a company listed on Bursa's official list, for alleged breaches of the listing requirements. The two main allegations of breach against the CEO and the two directors ('the applicants') were essentially for delays in the submission of accounts and for deviations in the financial results. There was a hearing before Bursa's Listing Committee ('the LC') in respect of these breaches. The issue to be determined in the hearing before the LC was whether the applicants as the CEO and members of the audit committee of the company had taken necessary steps to address the audit issues and whether there was compliance with timely submission of the audited annual accounts of the company for 2006. After the hearing, the LC decided to impose penalties in the form of public reprimands and fines on the applicants. The applicants appealed against the decision of the LC but the Appeals Committee ('the AC') upheld the decision of the LC. At the same time the Securities Commission ('the SC') initiated criminal charges under the Securities Industry Act 1983 against the applicants. The applicants then proceeded with the present applications for a judicial review of Bursa's decision to impose penalties against them. The first ground of challenge by the

applicants was grounded on the simultaneous criminal action by the SC and the proceedings by Bursa for breaches of the listing requirements. The applicants contended that Bursa had erred in law and acted in excess of its jurisdiction in the AC's decision when it proceeded to deliberate on the breaches against them despite the ongoing criminal proceedings against them. This was because the action by Bursa was said to pose a real risk of bias against the applicants. The applicants further submitted that they had relied on the advice and management of financial advisors in respect of the financial affairs of the company. The applicants also argued that after arriving at an erroneous decision, Bursa imposed penalties which were arbitrary, unjust and not in line with precedents.

**Held**, dismissing the applications with costs of RM2,000 against each applicant:

(1) The issues to be determined by Bursa and the issues to be dealt with in the criminal charges against the applicants were two separate issues. The main issue before Bursa was whether the audited annual accounts of the company for 2006 were factual, clear, unambiguous and accurate and contained sufficient information to enable an informed investment decision to be made by the public. The power entrusted on Bursa to protect investors' public interest would be defeated if it could not act in a swift manner and this would stifle its role as a statutory body that had to ensure and maintain a credible and transparent capital market. Further, in the action by Bursa there was no requirement to establish criminal element whereas in the criminal proceedings a judge would require different standards of proof. The judge would also have no cause to admit any evidence from the enforcement proceedings into the criminal case. In the circumstances the proceedings before Bursa could not be prejudicial to the applicants and there was no sub judice in the action taken on the breach of listing requirements pending criminal charges in the present case (see paras 8–10, 16–18).

(2) The applicants' contention that the financial matters of the company rested with the financial department ignored the legal duties of directors in relation to the financial state of companies. Although the directors could rely on the advice given by the management or auditors, they could not rely on others when they know or should know facts that would deny such reliance. From the disclosed facts in the present case, all the three applicants failed to discharge their obligations under the listing requirements as directors of the company. Further, s 167 of the Companies Act 1965 imposes obligations on the directors to keep accounts and other records to enable true and fair profit and loss accounts of the company. As such, the enforcement action taken by Bursa for breaches of the listing requirements was made bona fide (see paras 21–24, 27, 28).

(3) With regards to appeals before the AC, there was no automatic right to an oral hearing and it was the prerogative of the AC to allow or disallow a request for an oral hearing. In the present case, it was found that the applicants were given their rights of hearing and had ample opportunities to put their case before the LC. Hence the right of fair hearing had been complied with by Bursa (see paras 32, 37 & 40).

(4) The sufficiency or otherwise of penalties imposed on any breach of the listing requirements should lie with Bursa. Bursa should be allowed to exercise its discretion in line with the objective it should achieve. Further, Bursa is a regulatory body mandated under the law to maintain and promote the interests of members of the public dealing on the exchange. Thus, the courts had shown reluctance in interfering with Bursa's decision if it acted in good faith (see paras 52–54).

**[Bahasa Malaysia summary**

Bursa Malaysia Securities Bhd ('Bursa') sebuah syarikat pemegangan bursa diletakhak dengan kewajipan statutori untuk mengendali dan menjaga kepentingan masyarakat umum yang berurusan dengan bursa, telah memulakan prosiding-prosiding terhadap Ketua Pegawai Eksekutif dan dua pengarah Transmile Group Bhd ('syarikat tersebut'), syarikat yang tersenarai dalam senarai rasmi Bursa, untuk percanggahan keperluan penyenaraian. Dua dakwaan percanggahan utama terhadap Ketua Pegawai Eksekutif dan kedua-dua pengarah ('pemohon-pemohon tersebut') adalah terutamanya untuk kelewatan membuat penyampaian akaun-akaun dan untuk penyelewengan hasil kewangan. Terdapat perbicaraan di hadapan Jawatankuasa Penyenaraian Bursa ('JP') berkenaan dengan percanggahan tersebut. Isu untuk ditentukan dalam perbicaraan di hadapan JP adalah sama ada Ketua Pegawai Eksekutif dan ahli-ahli jawatankuasa audit syarikat telah mengambil langkah-langkah yang patut untuk menangani isu-isu audit dan sama ada penyampaian akaun-akaun tahunan syarikat yang telah diaudit bagi tahun 2006 mengikut masa telah dipatuhi. Selepas perbicaraan, JP memutuskan untuk mengenakan penalti dalam bentuk teguran awam dan saman terhadap pemohon-pemohon. Pemohon-pemohon telah merayu terhadap keputusan JP tetapi Jawatankuasa Rayuan ('JR') mengesahkan keputusan JP. Pada masa yang sama Suruhanjaya Sekuriti ('SS') telah memulakan tuduhan jenayah di bawah Akta Industri Sekuriti 1983 terhadap pemohon-pemohon. Pemohon-pemohon kemudian meneruskan permohonan-permohonan untuk semakan kehakiman keputusan Bursa untuk mengenakan penalti terhadap mereka. Alasan bantahan pertama oleh pemohon-pemohon adalah berdasarkan tindakan jenayah berturut-turut oleh SS dan prosiding-prosiding oleh Bursa untuk percanggahan keperluan penyenaraian. Pemohon-pemohon berhujah bahawa Bursa telah terkhilaf dalam undang-undang dan telah bertindak melebihi bidang kuasanya dalam keputusan JR apabila ia meneruskan untuk membuat pertimbangan tentang

percanggahan terhadap mereka meskipun terdapat prosiding jenayah yang berlanjutan terhadap mereka. Ini adalah kerana tindakan oleh Bursa dikatakan akan menyebabkan risiko berat sebelah sebenar terhadap pemohon-pemohon. Pemohon-pemohon selanjutnya berhujah bahawa mereka telah bergantung kepada nasihat dan pengurusan penasihat-penasihat kewangan berkenaan dengan urusan-urusan kewangan syarikat. Pemohon-pemohon juga berhujah bahawa selepas membuat keputusan yang salah, Bursa telah mengenakan penalti yang mana adalah bersifat arbitari, tidak adil dan tidak sejajar dengan duluan.

**Diputuskan**, menolak permohonan-permohonan dengan kos RM2,000 terhadap setiap pemohon:

(1) Isu-isu untuk ditentukan oleh Bursa dan isu-isu yang ditangani mengenai tuduhan-tuduhan jenayah terhadap pemohon-pemohon adalah dua isu yang berasingan. Isu utama di hadapan Bursa adalah sama ada akaun-akaun tahunan syarikat yang diaudit bagi tahun 2006 adalah berdasarkan fakta, jelas dan tepat dan mengandungi informasi yang mencukupi untuk membolehkan keputusan pelaburan yang bermaklumat untuk dilakukan oleh pihak awam. Kuasa yang diamanahkan kepada Bursa untuk melindungi kepentingan pelabur-pelabur awam tidak berguna sekiranya ia tidak boleh bertindak dengan segera dan ini akan mengehadkan peranan sebagai badan statutori yang harus memastikan dan mengendali pasaran modal yang berkredibiliti dan telus. Selanjutnya, dalam tindakan oleh Bursa tidak terdapat keperluan untuk mewujudkan elemen jenayah manakala dalam prosiding jenayah tersebut seorang hakim memerlukan tahap pembuktian yang berbeza. Hakim juga tidak seharusnya menerima sebarang keterangan daripada prosiding penguatkuasaan ke dalam kes jenayah tersebut. Dalam keadaan ini, prosiding di hadapan Bursa tidak boleh memprejudis pemohon-pemohon dan tidak terdapat *sub judice* dalam tindakan yang diambil untuk percanggahan keperluan penyenaraian menunggu tuduhan jenayah dalam kes ini (lihat perenggan 8–10, 16–18).

(2) Hujahan pemohon-pemohon bahawa perkara-perkara kewangan syarikat bergantung kepada jabatan kewangan menidakkan kewajiban perundangan pengarah-pengarah berkaitan dengan keadaan kewangan syarikat. Meskipun pengarah-pengarah boleh bergantung kepada nasihat yang diberikan oleh pihak pengurusan atau auditor-auditor, mereka tidak seharusnya bergantung kepada orang lain apabila mereka tahu atau patut tahu fakta yang mana boleh menafikan penyandaran tersebut. Daripada fakta-fakta yang dikemukakan dalam kes ini, ketiga-tiga pemohon gagal untuk melakukan tanggungjawab mereka di bawah keperluan penyenaraian sebagai pengarah-pengarah syarikat tersebut. Selanjutnya, s 167 Akta Syarikat 1965 memberikan kewajiban kepada

pengarah-pengarah untuk memerhatikan akaun-akaun dan rekod yang lain untuk memastikan keuntungan dan kerugian sebenar dan adil bagi akaun-akaun syarikat tersebut. Oleh itu, tindakan penguatkuasaan yang diambil oleh Bursa untuk percanggahan keperluan penyenaraian adalah dilakukan dengan bona fide (lihat perenggan 21–24, 27, 28).

(3) Berkenaan dengan rayuan di hadapan JR, tidak terdapat hak automatik untuk perbicaraan lisan dan adalah menjadi prerogatif JR untuk mengikut atau tidak mengikut permintaan untuk perbicaraan lisan. Dalam kes ini, adalah didapati bahawa pemohon-pemohon telah diberikan hak untuk didengar dan mempunyai peluang yang banyak untuk mengemukakan kes mereka di hadapan JP. Justeru hak untuk perbicaraan yang adil telah dipatuhi oleh Bursa (lihat perenggan 32, 37 & 40).

(4) Penalti, sama ada mencukupi atau tidak mencukupi, yang dikenakan terhadap sebarang percanggahan keperluan penyenaraian seharusnya ditentukan oleh Bursa. Bursa seharusnya dibenarkan untuk melaksanakan budi bicaranya sejajar dengan objektif yang ingin dikecapi oleh mereka. Tambahan, Bursa adalah badan berperaturan yang dimandatkan di bawah undang-undang untuk mengendalikan dan menjaga kepentingan orang awam yang berurusan dengan bursa. Justeru, mahkamah-mahkamah telah menunjukkan keberatan untuk campur tangan dengan keputusan Bursa sekiranya ia bertindak dengan niat baik (lihat perenggan 52–54).]

**Notes**

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 254–279.

For cases on duties, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 226–248.

**Cases referred to**

*Abdul Rahman bin Isa v Public Service Commission of Malaysia* [1991] 2 MLJ 240; [1991] 2 CLJ 972, HC (refd)

*AG v Times Newspaper Ltd* [1973] 3 All ER 54 (refd)

*Australian Securities and Investment Commission v Adler and Others (No 3)* (2002) 41 ACSR 72 (refd)

*Australian Securities and Investment Commission v Healey* (2011) 278 ALR 618, FC (refd)

*Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695; [2009] 4 CLJ 698, CA (refd)

*Capt M Paul Anthony v Bharat Gold Mines Ltd & Anor* [1999] 2 LRI 340, SC (refd)

*Cooke v Goodhew and Others* (1989) 91 ALR 447, FC (refd)

*Jang Bahadur Singh v Baij Nath Tiwari* AIR 1969 SC 30 (refd)

*Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152; [1977] 1 LNS 72, FC (folld)
*Kwikasair Industries Ltd v Sydney Stock Exchange Limited BC 6800002* (1968) CCH ASLC 30 (refd)
*Loot Ting Yee v Tan Sri Sheikh Hussain Bin Sheikh Mohamed & Ors* [1982] 1 MLJ 142, FC (refd)
*Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2002] 4 CLJ 701, FC (refd)
*R v International Stock Exchange of UK and Ireland Ltd, exparte Else Ltd* [1993] 1 QB 534 (refd)
*R v Michael S Chance Ex Parte Smith & Ors* [1995] BCC 1995 (refd)
*R v Nailsworth Licensing Justice ex parte Bird* [1953] 2 All ER 652 (refd)
*R v Panel on Takovers and Mergers ex parte Fayed and others* [1992] BCLC 938, QBD (folld)
*Ridge v Baldwin* [1964] AC 40, HL (refd)
*Rush v WA Amateur Football League Inc* [2005] WASC 206, SC (refd)
*Syarikat Kayu Wangi Bhd v Bursa Malaysia Securities Bhd* (Civil Suit No MT FLJC 13 June 2007), HC (refd)
*Tan Sri Dato' Hj Lamin Mohd Yunus v Bursa Malaysia Securities Bhd* [2012] 7 MLJ 85; [2011] 7 CLJ 215, HC (refd)
*Teoh Peng Phe v Wan & Co* [2001] 5 MLJ 149; [2001] 5 CLJ 222, HC (refd)
*Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa Malaysia Bhd* [2010] 6 CLJ 581, HC (refd)
*Tukumaram G Gaokar v RN Shukla and Others* AIR 1969 SC 1050 (refd)

**Legislation referred to**

Capital Markets and Services Act 2007 s 167
Companies Act 1965 s 167
Rules of the High Court 1980 O 53
Securities Industry Act 1983 ss 86(b), 122C(c)

*Ambiga Sreenevasan (Yap Chin Ling and Shireen Selvaratnam with him) (Song & Partners) for the applicant in R2–25–466 of 2010.*
*NS Guok (Simon Hong with him) (Guok, Leong Hong & Fong) for the applicant in R2–25–467 of 2010.*
*Lim Chee Wee (Ruth Garnet Maran with him) (Skrine) for the respondent in R2–25–466 of 2010.*
*Lim Chee Wee (Ruth Garnet Maran with him) (Skrine) for the respondent in R2–25–467 of 2010.*

**Rohana Yusuf J:**

**[1]** There are two applications for judicial review. Suit No R2–25–466 of 2010 is an application by Gan Boon Aun, who was the chief executive officer (CEO) of Transmile Group Bhd. The applicants in Suit R2–25–467 of 2010,

Khiudin bin Mohd and Shukri Abdul Tawab were directors and members of the Audit Committee of the board of directors of the same company. Both applications arise from the same set of facts and are heard together. The applications for judicial review are made of the respondent's decision in imposing penalties including public reprimands and fines on all the applicants as directors of Transmile Group Bhd ('Transmile'). Transmile was a company listed on Bursa's official list. There were allegations of breaches of listing requirements by Transmile resulting on the punishment meted out by the listing Committee on the applicants. On appeal the Appeals Committee upheld the decision of the listing Committee.

**[2]** The applicants now seek the following orders, pursuant to O 53 of the Rules of the High Court 1980:

(a) an order of certiorari to remove into the High Court and to quash the decision of the Appeals Committee of Bursa Malaysia Securities Bhd dated 6 September 2010 which disallowed the applicant's appeal to the Appeals Committee and upheld the decision of the listing Committee dated 23 February 2010;

(b) an order of mandamus to compel the Appeals Comittee of Bursa to allow the applicant's appeal;

(c) in the alternative to para (a) above, an order that the applicants appeals be remitted to Bursa to be heard/deliberated upon de novo by a different Appeals Committee on the merits and in accordance with law; and

(d) an order that enforcement of the decision of the Appeals Committee of Bursa dated 6 September 2010 be stayed until the final disposal of the application herein.

**[3]** These two applications are premised on the following grounds:

(a) that Bursa erred in law and acted in excess of or without jurisdiction in the Appeals Committee's decision when it proceeded to deliberated on the breaches against the applicants despite the ongoing criminal proceedings against them which could cause a real risk of prejudice;

(b) that Bursa had breached the rules of natural justice in failing to accord the applicants, oral submissions/representations;

(c) that Bursa had breached the rules of natural justice in failing to disclose the members of the Appeals Committee, thus depriving the applicants the opportunity to determine if there was potential bias;

(d) that Bursa had demonstrated bias by singling out the applicants to be penalised for the delay and deviation breaches;

(e) that Bursa had failed to take into account and/or fully appreciate relevant facts in relation to the delay;

(f) that Bursa had failed to fully appreciate that the applicants could not have known of the seriousness of the audit issue on 15 February 2007 because D&T had not at that time completed its review of certain transactions and therefore could not themselves have known of the seriousness of the audit issues then;

(g) that Bursa failed to consider sufficiently or at all the applicants position in Transmile and that the applicants had at all times exercised reasonable care and diligence in the circumstances of the case;

(h) that Bursa failed to take into account and/or fully appreciate relevant facts in relation to the deviation issue;

(i) that Bursa erred in law, acted in excess of or without jurisdiction when after arriving at the erroneous and perverse decision, Bursa went on to impose penalties that are arbitrary, unjust and without regards to precedent; and

(j) that the AC had therefore arrived at a decision that was unreasonable in the circumstances of the case and which was so perverse or devoid of plausible justification that no reasonable person/body of persons could have arrived at the same decision.

**[4]** There are two alleged breaches by the applicants. Firstly, there was a delay in the submissions of accounts and secondly there was deviation between the financial results announced. The said breaches are as summarised below:

Delay Breaches

| Document | Submission Due Date | Actual Submission Date | Delay |
|---|---|---|---|
| AAA 2006 | 30.4.2007 | 2.7.2007 | 42 market days |
| Annual Report for 2006 [AR 2006] | 30.6.2007 | 15.8.2007 | 33 market days |
| 1st QR 2007 | 31.5.2007 | 15.8.2007 | 54 market days |

Deviation Breaches

| Financial Year Ended 2005 | Profit/(Loss) after Tax and Minority Interest (RM million) | Date of Announcement |
|---|---|---|
| AAA 2005 (Audited) | 84,386 | 27.4.2006 |

| | | |
|---|---|---|
| Restated 2005 | (369.563) | 2.7.2006 |
| Deviation | 537.9 % | |
| Financial Year Ended 2006 | Profit/(Loss) after Tax and Minority Interest (RM million) | Date of Announcement |
| 4th QR 2006 (Unaudited) | 157.538 | 15.2.2007 |
| AAA 2006 | (126.329) | 2.7.2006 |
| Deviation | 180.2% | |

**[5]** After the hearing before the listing Committee the applicants each was imposed with the following punishments. These punishments were upheld by the Appeals Committee.

| Breach | Penalty Imposed |
|---|---|
| Delay in submission of the AAA2006 | Public Reprimand and Fine of RM21,000 |
| Delay in submission of the 1st QR 2007 | Public Reprimand and Fine of RM10,500 |
| Deviation between AAA 2005 & Restated 2005 | Public Reprimand and Fine of RM250,000 |
| Deviation between unaudited 4th QR 2006 and audited AAA 2006 | Public Reprimand and Fine of RM500,000 |

SIMULTANEOUS ACTION BY BURSA AND THE SECURITIES COMMISSION

**[6]** The respondent, as an exchange holding company is vested with statutory duties under Capital Markets and Services Act 2007. Pursuant to that statutory power it commenced parallel proceedings with the Securities Commission ('SC'). The respondent acted against the applicants pursuant to listing requirements ('LR') and the SC initiated criminal charges against the applicants. Gan Boon Aun was charged pursuant to s 86(b) of the Securities Industry Act 1983 read together with s 122C(c). The other two applicants Encik Khiudin bin Mohd and Encik Shukri bin Sheikh Abdul Tawab were also faced with charges on the alleged misleading statement relating to the fourth quarter 2006.

**[7]** The first ground of challenge advanced by the applicants is grounded on the simultaneous criminal action by the Securities Commission and the proceedings on breach of listing requirements by Bursa against the applicants. The action by the Bursa was said to pose real risk of bias against the applicants.

Learned counsel for the applicants Dato' Ambiga Sreenevasan, (Cik Yap Chin Ling and Cik Shireen Selvaratnam with her) for the Gan Boon Aun and Encik NS Guok (Encik Simon Hong with him) for Khiudin bin Mohd Said and Shukri bin Sheikh Abdul Tawab, contended that the Appeals Committee ('AC') erred in refusing to allow the applicants' appeal on the grounds of sub judice and potential prejudice posed against them in the criminal proceedings by SC.

**[8]** To appreciate this argument it must be made clear that the proceedings by Bursa against the applicants under the listing requirements were predicated on the issue that the applicants have knowledge or expected to have knowledge that there were open audit issues relating to the account of 2006. The issue to be determined therein is whether necessary steps were taken to address the audit issues, and whether there was compliance with timely submission of the audited annual account of 2006. The criminal charges however, concern on the issue of whether the applicants participate or have knowledge in the preparation of the account. These in my view are two separate issues.

**[9]** In the action by Bursa there is no requirement to establish criminal element. The main issue to be determined in the case before Bursa was whether the fourth quarter 2006 account was factual, clear, unambiguous, and accurate and contains sufficient information to enable informed investment decision by the public. Under the law Bursa is mandated with the objective of maintaining an efficient well informed and internationally competitive market for trading of securities. This very objective at the same time necessitates that Bursa takes swift and deterrent enforcement action.

**[10]** The issue therefore is how are the applicants prejudiced in the criminal trial in the face of the action by Bursa against them. Lord Denning MR in *AG v Times Newspaper Ltd* [1973] 3 All ER 54, described sub judice in the following terms:

> When litigation is pending and actively in suit before the court, no one shall comment on it in such a way that there is a real and substantial danger of prejudice to the trial of the action, as for instance by influencing the judge, the jurors, or the witnesses, or even by prejudicing mankind in general against a party to the cause.

**[11]** He further elaborated that even if the person who makes comments believes it to be true it would still be contempt of court for him to pre-judge a case before it is ascertained in the proceedings. Underlying this is the rule of fair trial. To maintain the integrity of the law therefore there should not be trial by other medium such as the newspaper, or television when the case or the

litigation is pending and actively in suit before the court. The test to be applied according to him is that there must be 'a real and substantial danger of prejudice'.

**[12]** The case of *R v Panel on Takovers and Mergers ex parte Fayed and others* [1992] BCLC 938, illustrates the point of bias when considering an application for stay of civil proceedings. It was held that the court have the power to intervene, to prevent continuation of one set of proceedings. This power however, should only be exercised where there is a real risk that those proceedings would prejudice the trial of the oiher proceedings. A pending disciplinary action before the panel of take over and mergers in that case, was found not to be prejudicial to the trial before the court. In that case it was emphasised that it would particularly be so, when the action in court is heard and tried by a judge and not a jury.

**[13]** In *R v Michael S Chance Ex Parte Smith & Ors* [1995] BCC 1995 a stay application was brought by a firm of chartered accountants to stay disciplinary proceedings commenced by the Executive Council of Joint Disciplinary Scheme of the Institute of Chartered Accountants on account that the client had filed a civil action. It was dismissed by the court. In dismissing the stay application it was observed that, if disciplinary proceedings designed to address public concern are stayed pending resolution of civil proceedings, it would be doubtful if that public concern can be met when it has to wait prior resolution of those proceedings. It was also deliberated that when dealing with public concern, (being an auditing process in that case) there will usually be overlapping facts between the issues in civil proceedings and under the disciplinary scheme. However, the court held that it should not be allowed to blur the different functions and different objectives of the two types of proceedings, (see *R v The Executive Council Joint Disciplinary Scheme ex parte Hipps and Others GBD (Crown Office List) 12 June 1996)*.

**[14]** The Indian Supreme Court in *Tukumaram G Gaokar v RN Shukla and Others* AIR 1969 SC 1050 (SC) took a similar position. The case involved an application for writ of prohibition restraining threatened proceedings that would impose a penalty for alleged complicity in gold smuggling. The application was based on the ground of contempt of a trial relating to an offence in connection with smuggling before a magistrate. The court rejected the application firstly, because it could not constitute contempt since the proceedings was made in good faith. The plea for contempt on the ground of initiation of disciplinary proceedings during pendency of a criminal case on the same facts was also rejected by the Indian Supreme Court in *Jang Bahadur Singh v Baij Nath Tiwari* AIR 1969 SC 30. (See also *Capt M Paul Anthony v Bharat Gold Mines Ltd & Anor* [1999] 2 LRI 340 (SC)).

**[15]** The Federal Court in *Loot Ting Yee v Tan Sri Sheikh Hussain Bin Sheikh Mohamed & Ors* [1982] 1 MLJ 142 referred to Jang Bahadur Singh and held that the initiation and continuation of disciplinary proceedings in good faith do not obstruct or interfere with the cause of justice in the pending court proceedings. The Federal Court of Australia in *Cooke v Goodhew and Others* (1989) 91 ALR 447 echoed the same position and observed that it must be assumed that no judge would be influenced with what he had read of a case.

**[16]** In the final analysis all these cases emphasise that the court recognise the separate function and role of the statutory bodies, as well as the concurrent right of the statutory bodies to exercise powers and duties, provided such exercise of power is made bona fide. A statutory body cannot be held for contempt of court when it exercises its powers in good faith. The court therefore should be slow to interfere unless there is a real risk of serious prejudice. Whether or not there is a real risk of serious prejudice will depend on the facts of each case and it must be balanced against the interest of public at large.

**[17]** Returning to the present case, the issues before the court and the issues before the respondent are clearly separate. Before the court, there were criminal charges which require proofs that are different from the one required before the Bursa. The proceedings before Bursa therefore cannot be prejudicial to the applicants in the criminal proceedings since firstly, they are before a judge which requires different standard and question of proof. The judge has no cause to admit any evidence from the enforcement proceedings into the criminal case. Further, the power entrusted on Bursa to protect investors' public interest and to ensure public confidence would be defeated if Bursa cannot act in a swift manner. It will then stifle its role as a body to ensure and maintain a credible and transparent capital market, in order to ensure investors' confidence to invest.

**[18]** In view of the above position, I agree with the argument of learned counsel for the respondent Encik Lim Chee Wee (Cik Ruth Garnet Maran with him) that there is no sub judice in the action taken on the breach of listing requirements pending criminal charges in the present case.

THE BREACHES

**[19]** The two main allegations of breaches against the applicants are essentially the delay in the submission of account and deviation between the financial results.

**[20]** Learned counsel for the applicants contended that as the CEO, Gan Boon Aun's function was mainly focussed on day to day business operation. He

also spent a lot of time oversees in the course of his duties. Financial matters were overseen by Audit Committee comprising three directors and a chief financial officer, Encik Lo Chok Ping (for almost the last ten years) assisted by the entire Finance Department. There was also internal auditor namely Moores Rowland Risk Management Sdn Bhd engaged for over seven years and the external auditors Delloite & Touche since the last three years. Relying on the case of *Teoh Peng Phe v Wan & Co* [2001] 5 MLJ 149; [2001] 5 CLJ 222, it was submitted by the applicants that the external auditor has a role to certify company's account, detect errors and detect fraud. Essentially the contention of learned counsel is in fact placing reliance on professional in the financial advisers of the company.

**[21]** The contention of Gan Boon Aun that the financial matters of the company rests with the financial department, the internal and external auditors in my view ignores the legal duties of directors in relation to financial statement of companies.

**[22]** This contention goes against the main thrust and duty of a CEO. A CEO and a director have duties to exercise care and diligence in the exercise of their functions in the company. The duties of directors in relation to approval of financial statement was recently dealt with by the Federal Court of Australia in the case of *Australian Securities and Investment Commission v Healey* (2011) 278 ALR 618. Reliance on advice of management and auditors was rejected by the Federal Court of Australia in that case when it held that relying on the expert did not per se discharge directors from their duties. Reasonable steps must be taken which requires each individual to take up upon themselves the responsibilities which commensurate their roles in relation to reading and understanding the financial statement. Complexities and volume cannot be an excuse.

**[23]** The court in that case also explained the duties and roles of directors as clearly and neatly summarised by learned counsel for the respondent in his written submission to be as follows:

(i) There is a core, irreducible requirement of directors to be involved in the management of the company and take all reasonable steps to be in a position to guide and monitor;

(ii) A director has the responsibility to familiarise himself with the fundamentals of the business of the company and is under a continuing obligation to keep himself informed about the activities of the company and to be familiar with its financial position by a regular review and understanding of its financial statements;

(iii) The objection duty of competence requires a director to have the ability to

read and understand financial statements and to at least, understand the terminology and the meaning of the concepts used in them;

(iv) A reading financial statements by directors is not merely for the purposes of correcting typographical or grammatical errors or even immaterial errors of arithmetic but for a more important purpose, that is, to ensure, as far as possible and reasonable, that the information included therein is accurate;

(v) All directors must carefully read and understand financial statements before they make a declaration under section 295(4) to opine whether the financial statements and notes comply with applicable accounting standards (section 296) and whether the financial statements give a true and fair view (section 297). Such a reading and understanding requires a director to consider whether the financial statements are consistent with his own knowledge of the company's financial position, that is, the knowledge which he has accumulated from carrying out his role and function of a director;

(vi) Even where a director has gone through the financial statements 'line by line', he may still not have taken all reasonable steps, if he has not focused upon the task of considering the statutory requirements and of applying the knowledge that he has of the affairs of the company;

(vii) A director, whatever his background, has a greater duty than that of simply representing a particular field of experience or expertise. He is not relived of the duty to pay attention to the company's affairs which might reasonably be expected to attract inquiry, even outside the area of the director's expertise;

(viii) Although the directors may rely on the advice given by the management or auditors, they cannot rely on others where they know, or by the exercise of ordinary care should know, facts that would deny such reliance.

**[24]** From the disclosed facts in the present case, all the three applicants failed to discharge their obligations under the listing requirements as directors of Transmile. The submission that Gan Boon Aun had discharged his duties by merely relying on both the internal and external auditors who had purportedly been negligent for failure to detect any defect cannot be sustained in the light of the legal duties imposed on directors. His pure reliance is unreasonable in fact, looking at the notification by Delloitte of the audit concern on 15 February 2007. The enforcement action against all the applicants centred on the events transpired on 14 February 2007 and 15 February 2007, when Transmile was supposed to have released its fourth quarterly report for year ending 2006 which was due by end February 2007.

**[25]** There was some audit concern prior to the issuance of the fourth quarter results 2006 (which was authorised by the Board on 15 February 2007,) that reported a net profit of RM157,538m. As a result of the audit

concern the audited annual accounts ('AAA') for year 2006 could not be finalised within time. The applicants contended that the Board was not informed of the concern despite being raised by Delloite in the Audit Committee meeting on 14 February 2007. As the AAA cannot be finalised before end of April 2007 the company applied for extension of time but it was disallowed by the respondent. The company appointed its internal auditor Moores Rowland Sdn Bhd to examine and address the concern. A special interim audit report was announced on 30 May 2007 stating the following:

(i) The Audit Committee and the CEO was fully informed of audit concerns

(ii) Overstatement of RM333 million in the Fourth Quarter Results 2006

(iii) Overstatement of consolidated revenue of financial year ended 31.12.2005 of RM197 million.

**[26]** The above report clearly confirmed that the Audit Committee and the CEO was fully aware of the audit concerns. The final subsequent report was finally made on 14 June 2007 which resulted in adjustment to be made to the AAA 2005 showing in fact a loss of RM369,363. The adjustment was filed with the Bursa. The AAA 2006 report filed on 2 July 2007 deviated more than 30% from the announced fourth quarter result earlier announced. Resulting from these facts the listing Committee issued the charges against the applicants for four charges of:

(a) delay in filing AAA 2006 (which was supposed to be filed by TGB on 30 April 2007 but was only filed by TGB on 2 July 2007) in breach of para 9.23(b) of the listing requirements (LR);

(b) deviation between the unaudited fourth quarterly results 2006 and AAA 2006 which was more than 30% in breach of para 9.16(1)(a) of the LR;

(c) delay in filing of first quarterly results 2007 (which was supposed to be filed by TGB on 31 March 2007 but was only filed on 15 August 2007) in breach of para 9.22 (1) of the LR; and

(d) deviation after restatement to AAA 2005 in breach of para 9.16(1)(a) of the LR.

**[27]** Though it can be argued that generally a director may rely on judgment, information and advice of management and other officers appropriately trusted, in *Australian Securities and Investment Commission v Adler and Others (No 3)* (2002) 41 ACSR 72 it was held that reliance would not be reasonable where directors know, or should have known by exercise of ordinary care of any fact that would deny such reliance. In that case the court rejected the application of the director to be exonerated from liability. The submission that

matters of finance to be left to professional in the area is untenable, when the directors know or ought to know of the concern relating to the AAA, in this case.

**[28]** Furthermore s 167 of the Companies Act 1965 imposes obligations on every directors and managers to keep accounts and other records to enable true and fair profit and loss accounts and balance sheet of a company. The failure to comply with this provision is an offence under this section. The legal duty imposed by this section clearly shows that the obligation of the directors in relation to account keeping of the company remains with the directors. With such imposition, the decision of a company cannot place the whole reliance on the financial advisers per se. From the facts of the present case it is clear that the charges are substantiated with the facts and the legal duties imposed on the company directors. The enforcement actions by Bursa supported by these facts are made bona fide, because there is clear breach of the listing requirements.

NATURAL JUSTICE

**[29]** The applicants alleged breach of natural justice against Bursa. The allegations are premised two main grounds. First on the denial of oral submission before the Appeals Committee, and secondly the failure of the Bursa to disclose who are the members of the Appeals Committee hearing the appeal.

**[30]** The allegation of denial of oral hearing was in relation to the hearing before Appeals Committee. On the day of Appeals Committee hearing, solicitor for Gan Boon Aun attended before the Appeals Committee but it was called off, with no reason given. Thereafter the Appeals Committee proceeded and pronounced its decision. It was contended that, by fixing date for the appeal the Appeals Committee gave the impression that the Appeals Committee wanted to give opportunity for oral representation, pursuant to request made by the Goh Ban Aun.

**[31]** It must be borne in mind that Bursa's enforcement proceedings are premised on documentary evidence and written representations of the parties. This is clearly set out in the 'Enforcement Procedures against Director of Listed Issues in Respect of the Alleged Breach of the Listing Requirements of Bursa Malaysia Securities Berhad'. It must also be appreciated that the right to natural justice requires a right of fair hearing which cannot be equated with a right to an oral hearing. The hearing can take many forms as decided by the Federal Court in *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152; [1977] 1 LNS 72. It was stated in this case that a tribunal fulfils it obligation to hear by giving notice and inviting written response.

**[32]** In fact in absence of mandatory rule, the right to oral hearing is not an automatic right. So long as fair opportunities are given to the person, the *audi alter partem rule* is considered observed. In this case, Bursa had sufficiently accorded the applicants the right to be heard by allowing them to challenge the evidence tendered against them by putting their cases before the listing Committee orally.

**[33]** Gan Boo Aun submitted written representations dated 31 May 2007, 19 July 2007 (in relation to the delay breaches in exh GBA3), 20 July 2007 and 8 August 2007 (in relation to the deviation breaches in exh GBA3) and was further given a right of oral hearing before the listing Committee on 28 January 2010. Gan Boon Aun therefore had ample opportunity to put his case before the listing Committee which included challenging or disputing the evidence against him and tendering his evidence before the listing Committee.

**[34]** With regards to appeals before the Appeals Committee, the oral representation before the Appeals Committee is not as of right but is at the discretion of Bursa. The Appeals Committee at its discretion may decide if in its opinion an oral hearing is necessary. This is also clearly set out in the directors' enforcement procedures. A director must ensure that his written representations are complete and comprehensive. In addition to the written and oral representations (at the hearing before the listing Committee on 28 January 2010), Gan Boo Aun had submitted full written representations. The Appeals Committee had decided that the written representations were sufficiently clear and the issues submitted could, be adequately dealt with based on the written representations and documents. In this way the need for further oral clarification do not become necessary.

**[35]** Gan Boo Aun was informed, by way of letter dated 4 June 2010 that the Appeals Committee had decided to hear the appeal based on written submissions. On 16 June 2011, the management of Bursa responded to Gan Boo Aun's further representations and on 24 June 2010, Gan Boon Aun requested for two weeks to respond. Gan Boo Aun did not request nor insist on oral representation.

**[36]** Khiudin and Shukri submitted written representations dated 2 March 2010 (through its previous solicitors Messrs Ranjit Singh & Yeoh) (exh A5) and written submissions dated 27 May 2010 (through the current solicitors Messrs Guok & Leong) (exh A6) and were further given right of oral hearing. The solicitors of the applicants had chosen to leave the hearing of the listing Committee on 28 January 2010 and cannot now allege that they were not given the opportunity to be heard orally. Further, Khiudin and Shukri did not request for oral representations before the Appeals Committee.

**[37]** There is no automatic right to an oral hearing under the law. It is the prerogative of the Appeals Committee to allow or disallow a request for an oral hearing and if the Appeals Committee decides not to grant the applicant's request, the Appeals Committee will proceed to consider and determine the matter. From the facts, in my view the applicants were given their rights of hearing and had ample opportunities to put their case before the listing Committee, including challenging and disputing the evidence before the listing Committee.

**[38]** In the leading case of *Ridge v Baldwin* [1964] AC 40, the House of Lords held that a chief constable who was dismissed from his office without any opportunity to put his case or without notice of the proposal, had been treated unfairly and that the rules of natural justice had been ignored. His Lordship in that case promulgated the overall test for procedural fairness as 'what a reasonable man would consider to be fair in the particular circumstances'.

**[39]** In the case of *Abdul Rahman bin Isa v Public Service Commission of Malaysia* [1991] 2 MLJ 240; [1991] 2 CLJ 972, the applicants sought an order of certiorari in order to quash the decision of the respondent dismissing him from the public service as a customs officer. The respondent argued that the respondent having decided to dismiss the applicants after considering his representation had a discretion and was 'entitled to disallow the oral hearing requested for' as it had complied with the audi alteram partem rule and accordingly there has been no breach of natural justice. KC Vohrah J (as he then was) agreed with the arguments of the respondent in that case:

> When the show cause letter was sent and the exculpatory letter furnished with a request for an oral hearing there was no obligation on the part of the respondent to grant an oral hearing. The respondent was entitled to deliberate and decide on the representation as it stood. It was held in that case that, the applicant was not entitled as a matter of right to an oral hearing and the decision of the respondent cannot be said to have been made in breach of natural justice just because it was arrived at without oral hearing he had requested.

**[40]** In the circumstances, in my view there is sufficient opportunity given to all the applicants to present their respective cases, and hence the right of hearing has indeed been complied with by Bursa.

NON–DISCLOSURE OF AC MEMBERS

**[41]** The applicants alleged breach of natural justice on the part of Bursa, when it did not disclose who the members of the appeals court were. The applicant contended that the failure to disclose the names of members of the Appeals Committee had deprived them of the opportunity of raising potential

bias. It must be noted that there is no obligation on the Bursa to disclose the names of the members of Appeals Committee. Besides, the applicants had not at any point in time, requested or were interested to know also the members of Appeals Committee, deciding on their appeals.

**[42]** When the case was stood down for decision, additional submission was made by learned counsel for Bursa, where all the Appeals Committee members' names were disclosed. Time was given to the applicants to reply further to the additional submission, with a new dated fixed for learned counsel for the applicants to seek instruction on the same. The applicants could have raised issue of biasness if they so wish. However the reply submission by the applicants does not raise such issue. The submission by the applicants centred on the issue that the fact that Bursa discloses the name shows that Bursa also agreed with the submission of applicants that they had failed to comply with rules of natural justice.

**[43]** For a case of bias to be established, the burden rests on the applicants to show proof. Case laws show that the burden to be discharged for allegation of bias in a tribunal is more stringent than in the court. The Federal Court in *Mohamed Ezam bin Mohd Nor & Ors v Ketua Polis Negara* [2002] 1 MLJ 321; [2002] 4 CLJ 701 applied the test of real danger of bias. In the case of a tribunal however actual bias is necessary to be proved, as seen in the decision of the Supreme Court of Western Australia in *Rush v WA Amateur Football League Inc* [2005] WASC 206. The law as explained by the Supreme Court in that case is clearly stated in the judgment of Dixon J as follows:

> The only legally operative bias from the standpoint of natural justice was the actual bias of Doherty which had assumed invincible proportions. It seems clear that, if the actual bias of Doherty was necessary to vitiate the proceedings of the tribunal, the bias as to which all the others must have come under reasonable suspicion could not have been either relevant to disqualify them or sufficient to invalidate what they decided.

**[44]** Also in *R v Nailsworth Licensing Justices ex parte Bird* [1953] 2 All ER 652 it was held that to justify setting aside of a decision of the licensing committee in that case there must be something in the nature of real bias and the objection could and should have been made before the decision had been announced.

**[45]** Thus an allegation of bias cannot be made on mere misapprehension that the disclosure of the names of the members of the Appeals Committee would proof bias. The allegations must be substantiated and cannot be speculated on undisclosed basis. In a domestic tribunal as opposed to court, actual bias as opposed to apprehended bias is necessary to be established. The

applicants here had never shown any interest or made make any request to find out who were the Appeals Committee members who deliberated on their appeals, till up to the hearing of this application. The right to contend bias should have been made before the decision is announced following *R v Nailsworth Licensing Justice ex parte Bird* [1953] 2 All ER 652. It would have been different if the applicants had shown interest to find out who were the Appeals Committee members before a decision was announced. In absence of such request for disclosure the applicants' contention remained a mere possibility and thus, far from discharging the burden it remains speculative.

PENALTIES

**[46]** Learned counsel for the applicants urged this court to review the penalties imposed by Bursa on the grounds of them being excessive, unreasonable, and unprecedented. It was argued that Bursa erred in law and had acted in excess of its jurisdiction, after arriving at an erroneous decision, imposed penalties which are arbitrary, unjust and not in line with precedents. Further to that learned counsel contended that the daily penalty imposed on Gan Boon Aun should not go beyond the date he resigned from his executive duties or from the position of CEO on 19 June 2007.

**[47]** It must first be noted that Bursa is empowered under para 16.17(1)(b) of the listing requirements to impose fine not exceeding RM1,000,000,00. This limit had not been exceeded by Bursa in this case.

**[48]** In arriving at the penalties imposed, Bursa had taken into account the significant variance involved between the Transmile's audited account and restated account of RM453,949,000 for the financial year ended 31 December 2005 as well as the difference of RM283,867,000 between Transmile's unaudited and audited results for financial year ended 31 December 2006. These definitely impacted the share price of Transmile in the market very significantly as highlighted in para 52 of Bursa's management submission before the Appeals Committee. The investors and shareholders at large were relying on this information, and Bursa has a duty to protect all of them.

**[49]** It must be born in remind that, it remains the statutory duty of Bursa to maintain an efficient, well informed competitive market for securities trading. Towards this objective Bursa will have to enforce various rules and regulations pertaining to the conduct of listed companies. In enforcing these rules Bursa has its own internal procedures which it has complied. At the same time Bursa would have to take swift action to enforce any breach of any listing requirements.

**[50]** The applicants tabulated the penalties imposed by Bursa in earlier cases

to compare and to drive a point that the penalties on the applicants are excessive and not in line with the earlier cases. In my view there is no basis for such comparison. After all no two cases are the same, and there are material difference between one case to another.

**[51]** The contention that daily penalty should cease upon resignation is to my mind, a flawed suggestion. If an imposition for daily breaches stops upon resignation of a director then it will encourage anyone taken to task by Bursa for breaches of listing requirements to just hand in his resignation in order to escape liability. If such is allowed, it will defeat the whole purpose of the enforcement proceedings. Breaches took place when the applicants were in the position to rectify. They must be responsible for their failures. They cannot in the face of an action by Bursa resign and claim to be no longer in control of the accounts. It would therefore be appropriate that the penalties run until the breaches are remedied not after the resignation. To allow the directors to take the easy way out by just resigning from their positions upon being charged would encourage shirking of responsibilities and duties through an easy escape route.

**[52]** The sufficiency or otherwise of penalty imposed on any breach of listing requirements must lie with Bursa. Bursa should be allowed to exercise its discretion in line with the objective it must achieve. In this case the deviation shows a difference of RM453,949m between Transmile's audited and restated audited results for the financial year ended 31 December 2005 which represents a variance of approximately 537.9%. The deviation or difference of RM283,867m between Transmile's unaudited and audited results for the financial year ended 31 December 2006 represents a variance of approximately 180.2%. This comes up to an alarming figure of RM737,816m. Such deviation is alarming and certainly impacted on investors and shareholders at large. Stringent penalties may be necessary to discourage such incidences otherwise, market confidence cannot be achieved.

NON–INTERFERENCE BY COURT

**[53]** The court had shown reluctance in interfering with Bursa decision in enforcing its objective done in good faith. The principle of non interference is premised on the basis that Bursa is a regulatory body mandated under the law to maintain and promote the interests of public members dealing on the exchange, and should be left to carry its objectives unless it acted in excess of jurisdiction. The Court of Appeal in *Bursa Malaysia Securities Bhd v Gan Boon Aun* [2009] 4 MLJ 695; [2009] 4 CLJ 698 adopted the same position. This was echoed in all the later decisions of the High Court in *Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa Malaysia Bhd* [2010] 6 CLJ 581, *Syarikat*

*Kayu Wangi Bhd v Bursa Malaysia Berhad* (Civil Suit No MT FLJC 13 June 2007), *Tan Sri Dato' Hj Lamin Mohd Yunus v Bursa Malaysia Securities Bhd* [2012] 7 MLJ 85; [2011] 7 CLJ 215.

**[54]** Similar stance is taken in other Commonwealth jurisdiction such as United Kingdom, Australia and New Zealand. In the Australian case of the *Kwikasair Industries Ltd v Sydney Stock Exchange Limited BC 6800002* (1968) CCH ASLC 30, the court refused to overturn the decision of exchange and Street CJ in that case observed that the stock exchange is not only entitled but duty bound to be concerned with maintaining of fair market which is predominant amongst all its objectives. His Lordship further observed in that case that, so long as it remains with its main objective the members of its committee should be left to exercise honestly their powers unencumbered by the prospect of having to face litigious investigation of correctness of their decision. In *R v International Stock Exchange of UK and Ireland Ltd, exparte Else Ltd* [1993] 1 QB 534, it was observed by Lord Bingham that, 'the court will not second-guess the informed judgment of responsible regulators steeped in knowledge of their particular market'. These cases demonstrate the attitude of the courts in reviewing the decision made by the exchange in different jurisdiction.

**[55]** For the above reasons, it is clear that the applicants had failed to establish the grounds raised against the respondent. In view of that, this court, in line with all the above decisions should remain reluctant to interfere with the decision of Bursa. I therefore dismiss the application in Suit No R2–25–466 of 2010 and in Suit No R2–25–467 of 2010 with costs of RM2000 against each applicant.

*Applications dismissed with costs of RM2,000 against each applicant.*

Reported by Kohila Nesan